MPI POLYESTER INDUSTRIES SDN BHD

v.

ENG KOO KIANG & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S1-22-167-2004]
8 OCTOBER 2010

TORT: *Negligence - Breach of duty - Fiduciary duty - Whether first and fourth defendants owed fiduciary duty to plaintiff - Whether duties and interest conflict -First and fourth defendants' knowledge of second defendant's actions - Whether reasonable diligence exercised - Whether negligence proved*

TORT: *Conspiracy to injure - Intention - Whether defendants conspired among each other to cause detriment to plaintiff - Whether there was common purpose among defendants - Whether defendants had predominant purpose to injure plaintiff - Whether plaintiff suffered damages*

The plaintiff was involved in the business of manufacture and sale of polyester resins ('the said products'). The defendants were the previous employees of the plaintiff. The plaintiff's claim premised on the fact that during the defendants' employment, they had wrongfully and/or maliciously conspired to defraud and injure the plaintiff in its said business by purchasing the said products for themselves and/or had sold them to the market through intermediaries in order to realize profits for themselves. Prior to the trial, the second defendant chose not to defend the claim and judgment was entered against him where else the third defendant had entered consent judgment with the plaintiff. The first and fourth defendants being the general manager and the plant manager respectively asserted that they had no knowledge of the second defendant's actions which had caused severe losses to the plaintiff and denied complicity of the same. The first defendant had also counterclaimed against the plaintiff for wrongful dismissal. The issues that arose for consideration were (i) whether there was negligence on the part of the first defendant as the general manager of the plaintiff's company (ii) whether the first and fourth defendants had breached their fiduciary duties (iii) whether there

A was conspiracy between the first, second and fourth defendants to injure the business of the plaintiff (iv) whether there was receipt of secret profits by the first and fourth defendants from the second defendant and (v) if there were such evidence, what were the damages payable.

B

Held (allowing plaintiff's claim with costs and dismissing first defendant's counterclaim):

(1) The first defendant owed a duty to the plaintiff wherein he had failed to exercise reasonable diligence to ensure that there were no losses and no profits made by the employees at the expense of the plaintiff. Since the first defendant had knowledge of the second defendant's actions, he had thus breached his duty. The plaintiff had proved negligence on the part of the first defendant. (paras 43 & 44)

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(2) Owing to the nature of their functions and duties, the first and fourth defendants owed a fiduciary duty and were not to act in a manner where their duty and interest might conflict nor for their own benefit to the detriment of their employer without their employer's consent. They had acted to enrich themselves at the expense of the plaintiff and had committed a breach of fiduciary duty. (paras 49 & 50)

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(3) A conspiracy by unlawful means was proven when two or more individuals combined to commit an unlawful act or to effect an unlawful purpose with the intention of causing injury or damage to the plaintiff. As for conspiracy to injure, the plaintiff must have proven that there was a predominant purpose by the defendants to injure the plaintiff in carrying out their common purpose. The act of conspiring involved the agreement to work on furtherance of the common purpose. (paras 51)

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(3a) Unlawful means were employed by the defendants to carry out illegitimate activities. The plaintiff had established conspiracy against the defendants wherein there were clear evidence of knowledge and complicity by the defendants of the transactions that had enriched them to the detriment of the plaintiff. (paras 52 & 54)

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I **(4)** The first and fourth defendants had received secret profits as was evidenced from the cheque butts and from the evidence given by the third defendant. (para 55)

(5) The plaintiff was allowed to claim damages as provided by the court for losses in relation to the supply and sale of goods to companies related to the first and second defendants and secret profits obtained by the first and fourth defendants. (paras 57 & 60-69)

Case(s) referred to:
Attorney-General of Hong Keng v. Reid and Others [1994] 1 All ER 1 ***(refd)***
Bristol v. West Building Society v Mothew [1996] 4 All ER 698 ***(refd)***
Hospital Products Ltd v. United States Surgical Corporation and Others [1984] 55 ALR 417 ***(refd)***
Hussain Umar v. Dalip Singhji AIR (57) [1970] SC 45 ***(refd)***
Lorenho Plc v. Fayed [1992] 1 AC 448 ***(refd)***
Tan Sri Dato' Dr Awang Had Salleh & Anor v. Dato' Dr Hj Mohamed Haniffa Hj Abdullah [2007] 5 CLJ 565 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 114(g)

For the plaintiff - Terence KM Chan (Tan Shin Shin with him); M/s Lim Kian Leong & Co
For the 1st defendant - Teh Hong Jet; M/s Tan Kim Siong & Teh Hong Jet
For the 4th defendant - Thoo Yee Huan; M/s Halim Hong & Quek

Reported by Kumitha Abdul Majid

JUDGMENT

Harmindar Singh Dhaliwal JC:

[1] This was a claim by an employer against its former employees. The employer discovered various self-serving and dubious transactions entered into by its employees which resulted in severe losses to the employer and tidy profits for the said former employees. By this claim, the employer aims to recover those losses and profits.

The Claim

[2] That employer, the plaintiff in this case, was principally involved in the business of manufacture and sale of polyester resin. The plaintiff company also sold waste materials which are the by-product of its manufacturing process. For convenience, the polyester resins and the waste products will be referred to as "the said products" or "the finished goods".

[3] At the relevant time, the 1st defendant was the general manager of the plaintiff until he was terminated on 14 July 2003. The 2nd defendant was the marketing manager of the plaintiff until his termination on 14 July 2003. The 3rd defendant was the logistic executive of the plaintiff until he was also terminated on 14 July 2003. The 4th defendant was the plant manager of the plaintiff until his resignation sometime in February 2003.

[4] Sometime in early 2003, the plaintiff commenced an internal audit investigation to look into the causes for the low profit margins of the plaintiff. This investigation resulted in the eventual termination of the 1st, 2nd and 3rd defendants.

[5] The allegation of the plaintiff was that the defendants during their employment had wrongfully and/or maliciously conspired and combined amongst themselves to defraud and injure the plaintiff in its said business. In a nutshell, the scheme operated was basically to purchase the said products for themselves and/or to sell them to the market through intermediaries to realize profits for themselves.

[6] The 2nd defendant chose not to defend the claim after defence had been filed and judgment was entered against him prior to the trial. The 3rd defendant, on the eve of the trial, entered into a consent judgment with the plaintiff on 23 August 2010. The terms recorded were essentially the same as set out in the statement of claim. As against the remaining defendants, the plaintiff alleged negligence, breach of fiduciary duty and conspiracy to injure the business of the plaintiff company. The plaintiff also claimed for an account of secret profits or commission by the 1st and 4th defendants. The 1st and 4th defendants, in their defence, asserted that they had no knowledge of the 2nd defendant's actions. There is also a counterclaim brought by the 1st defendant against the plaintiff alleging wrongful dismissal.

The Facts

[7] The evidence as elicited through the testimony of the witnesses and the documents revealed the following. The plaintiff was engaged in the business of manufacturing and sale of polyester resins which are basically the by-products of petroleum. The polyester resins are used for the manufacturing of plastic bottles and other plastic based products.

[8] Sometime in April 2003, the plaintiff commenced an internal audit investigation to look into the causes for the low profit margin. It was headed by the Senior Audit Manager, PW1. It transpired that although the local and international selling prices of the polyester resins had skyrocketed during the Iraq War, the profits margins of the plaintiff remained low. The management then suspected that there could be irregularities in the plaintiff's operations and management.

[9] PW1 and her team carried out the audit and the areas reviewed were pricing and discount, sales, credit review, distribution, transport and logistic, purchasing, stock, profit and loss and balance sheet review. In carrying out their task, the audit team examined the contract of sales, invoices, purchases orders, shipping documents, bank-in slips, management reports, bank statements, stock reports and other accounting records of the plaintiff company.

[10] In the course of their investigations, they were also able to seize from the 2nd defendant 10 personal registers on sales from the period July 1997 to January 2002 and 16 personal cheque butts for accounts held in Maybank Bhd, Hong Leong Bank Bhd and EON Bank Bhd.

[11] These investigations were concluded on 15 August 2003 and a report was prepared. A police report was also lodged. As a result of these investigations, the 1st, 2nd and 3rd defendants were terminated.

[12] The audit team prepared an Audit Investigation Reports dated February 2004. From their investigations, they discovered that the cheques received from 11 different customers were drawn from a few common bank accounts and the cheques were in respect of payment for goods sold to the customers. DW1 also went on to testify, that out of the 178 cheques received, a total of RM3,607,05.73 was drawn from the 2nd defendant and/or his wife, Loke Jee Meow's personal and joint account, Strategic Strength Sdn Bhd and Plastic Polyester Marketing accounts, which were established as being directly or indirectly related to the 2nd defendant. The irresistible inference here is that the real customers behind the purchase of the polyester resins were none other than the 2nd defendant and his related parties.

[13] So what was the *modus operandi* of the 2nd defendant and his related parties?

DW1 testified that from their investigations, 2nd defendant used a non-existent or phantom company called Cyplast (M) Sdn Bhd to purchase the polyester resins for themselves and to subsequently sell these at higher prices thus enriching themselves. Besides Cyplast, there were other dubious local sales to companies such as Trans-Polymers Marketing Sdn Bhd, and Brylchem (M) Sdn Bhd which companies were related to 2nd defendant's family members. There were also dubious export sales to Singapore through the following companies – K4 Bistek; Brylchem Enterprise; Tradespec Material Supplies and Chemipac Marketing Services. It turned out that these companies were all related to the 2nd defendant and were used for the purpose of showing purported sales which were actually false.

[14] Apart from Singapore, there was also a dubious sales contract with a company called Balkan Pacific Co. Ltd where the finished goods were paid for from a local and personal bank account. Investigations through documents revealed that the goods were later sold by Strategic Strength Sdn Bhd to PET Bottle Co. and a profit of RM17,176 was then derived being the difference in the value of the contracts.

[15] In all these dubious transactions, there were no purchase orders or delivery instructions signed or issued by these companies. Payments for these contracts originated from bank accounts controlled by the 2nd defendant and his accomplices. It also transpired that the said goods were collected locally instead of being shipped or transported to Singapore. In effecting such sales, the plaintiff is contending that the defendants had secretly and corruptly made a profit equivalent to an average of 20-30% of the total sales effected or approximately RM3,156,462.99.

[16] It was also in evidence that the 1st defendant wrongfully and in breach of his contract of service, sold or caused the plaintiff's company to sell to a company called CJ Polymers, the plaintiff's finished goods totalling RM4,468,887.40. The plaintiff contends that the finished goods were sold at a lower price because the contact person in CJ Polymer was the 1st defendant's son, one Alvin Eng. The plaintiff is claiming a sum of

RM636,606.04 being the difference between the Average Approved Export Price (as per PCI Report) and the Plaintiff's Actual Average Export Price.

[17] There was also some evidence of other fictitious transactions for which there were no purchase orders or delivery instructions but which could not be related to the 2nd defendant or his family members. The total amount of sales of polyester resins derived was RM59,851,101. On the same basis, the plaintiff is claiming loss suffered to the extent of RM5,361,265.52.

[18] The plaintiff also sought to show that pursuant to the conspiracy by the defendants, a further sum of RM6,276,058.66 was lost for sales to local customers at a lower price. The total sales in this regard was RM77,295,356.08.

[19] Now there are also evidence from the 10 personal registers and 16 personal cheques butts that the 1st, 3rd and 4th defendants received payments from the 2nd defendant. It was confirmed through the testimony of DW1 and the 3rd defendant who testified on behalf of the plaintiff that all these documents were in the handwriting of the 2nd defendant. From the cheque butts, it appeared that the 1st defendant received RM170,760,00, the 3rd defendant RM8,950 and the 4th defendant RM178,827. The plaintiff claimed for these sums on the basis that they were inappropriate payments in the form of secret profits or commission through the conspiracy.

[20] So what was the response of the defendants? There was no serious challenge to the version of events as put forward by the plaintiff. Essentially, the position taken by the 1st and 4th defendants in their testimony was that they had no knowledge of the actions of the 2nd defendant and denied any complicity of the same. They each had an explanation for the sums allegedly received as secret profits which I will come to later in the judgment.

[21] With this factual matrix, I considered that the broad issues for consideration by the court could be summarized as follows:

1. Whether there was negligence, on the part of the 1st defendant as the general manager of the plaintiff's company.
2. Whether there were breaches of fiduciary duty on the part of the 1st and 4th defendants.

3. Whether there was conspiracy between the 1st, 2nd and 4th defendants to injure the business of the plaintiff's company.

4. Whether there was receipt of secret profit by the 1st and 4th defendants from the 2nd defendant.

5. If there was such evidence, what are the damages payable?

[22] Now for each of the areas of alleged wrongdoing, there is one overriding issue that for convenience has to be dealt first. This is the issue raised by the 1st and 4th defendants in that they had no knowledge of the actions of the 2nd defendant and were therefore not complicit in any wrongdoing.

Knowledge And Culpability Of 1st Defendant

[23] The evidence against the 1st defendant is that he had received payments on 24 occasions a total sum of RM170,760 being inappropriate payments from the 2nd defendant. The 1st defendant denied receiving the 24 cheques but he admitted that he had lent some monies to the 2nd defendant on two occasions. The first occasion was when the 2nd defendant's brother was critically ill and on another occasion when he (1st defendant) purchased some bird's nest for the 2nd defendant's ill brother. The 1st defendant claimed that the 2nd defendant had repaid the sum of RM8,650 for both occasions.

[24] As against this denial of the 1st defendant is the evidence of payment as stated in the cheque butts. The evidence of transactions as contained in the personal registers confiscated from the 2nd defendant is compelling as the 3rd defendant had confirmed the handwriting in those documents to be that of the 2nd defendant. There was no direct challenge on these contemporaneous documents and the contents of these documents proved to be a true record of the illegal transactions kept by the 2nd defendant. It should be noted that the machinations of the 2nd defendant and his accomplices in relation to the dubious sales transaction were hardly disputed and understandably so as the evidence was overwhelming.

[25] Significantly as well, a perusal of the cheque butts seized showed there were two matching payments made by the 2nd defendant to the 1st defendant. The 1st defendant now contends that they were repayments of debts. Now is that credible?

[26] I have noted that the evidence of matching payments and the subsequent explanation of repayment of debt only came about after the court had ordered interrogatories to be answered failing which the 1st defendant would be precluded from defending the suit. Equally significant is the fact that the acceptance of inappropriate payments was a charge levied against the 1st defendant in the domestic inquiry conducted by the plaintiff after which he was subsequently dismissed. If he was innocent as he is proclaiming now, I have no doubt he would have filed his claim with the Industrial Court. He did not do that and instead made a claim through a counter-claim in this suit for which the remedies are significantly less.

[27] Now it is also noteworthy that the 1st defendant's denial and claim of repayment of debt could have been supported by calling the 2nd defendant. No explanation was adduced for the failure to call him. I think the failure to call the 2nd defendant certainly calls for the invocation of adverse inference under s. 114(g) of the Evidence Act 1950.

[28] But that is not all. The evidence of the 3rd defendant as the plaintiff's witness is undeniable. The 3rd defendant told the court that he had brought to the attention of the 1st defendant the fact of the irregularities within the operations of the plaintiff with the result that not only was there no action by the 1st defendant but that he was also taken for a ride by the 2nd defendant soon after his complaint and told that it was futile to complain as the 1st defendant was also in the loop as far as the irregularities were concerned.

[29] At the end of the trial, the defendants submitted, through their counsel, that the evidence of the 3rd defendant is suspect as he had admitted his complicity in the illegal scheme. They were trying to suggest that the 3rd defendant was telling a tall tale. But why would the 3rd defendant make up this whole tale? There was no suggestion during cross-examination that his evidence was tainted in any way. I considered that the only benefit for him in this whole episode was to tell the truth. He had come clean on his role in the conspiracy by even providing documents to the plaintiff apart from his testimony in court. There was no reason for him to make up a story to the detriment of the 1st defendant and none was suggested by the defendants. In fact, the testimony

of the 3rd defendant left me with the impression that he was hesitant in implicating the 1st defendant probably out of deference to him. I think he knew more about what had transpired but curiously, no one asked him. I had therefore no doubt that he was indeed telling the truth.

[30] For all these reasons, I am convinced that the 1st defendant did indeed receive these 24 payments as secret profits or commissions amounting to RM170,760.

[31] Now the 1st defendant also denied any knowledge of the dubious sales transaction. He claimed that he did not know that the companies in question were related to the 2nd defendant. He did not suspect anything wrong in all those contract of sales because the price was based on the minimum guided price and the market price at the material time. Further, all these contract of sales were under cash terms so no suspicion could arise.

[32] Now if that was all that the plaintiff had against him, then certainly the 1st defendant would be entitled to the benefit of any doubt. But we now know that he accepted inappropriate payments from the 2nd defendant and that going by the gripping evidence of the 3rd defendant, the 1st defendant certainly had knowledge of what was going on. He was the general manager. I therefore do not think he can play innocent here.

[33] The 1st defendant's willingness to engage in dealings where a conflict of interest can arise certainly supports the inference that he was not so innocent after all. It was in evidence that he had dealings with his own son who was the sales manager in CJ Polymers. Documents P22 and P23 is evidence of this and his denials of such transactions only fortify the contention that he was being less than candid in this regard. This charge of conflict of interest in dealing with his son was raised against the 1st defendant in the domestic inquiry. After his dismissal from the company he did not see it fit to challenge this in the Industrial Court.

[34] In the final analysis, I think the evidence of knowledge, culpability and complicity in the transactions carried out by the 2nd defendant and his accomplices was overwhelming and compelling. To put it in another way, there is no way, in my view, that the 2nd defendant could have carried out his elaborate, crafty and nefarious plan and activities without the 1st defendant's complicity.

Knowledge And Culpability Of 4th Defendant

[35] In the case against the 4th defendant, the plaintiff tendered 41 cheques of the 2nd defendant to show that the 4th defendant had received a sum of RM178,827 from the 2nd defendant as reward or secret profits. The 4th defendant denied any knowledge of fraudulent sales and receiving any secret profits out of the sales.

[36] As against his denial is the evidence of the cheque butts for which the 4th defendant has admitted receipt of 23 matching payments. The 4th defendant claims that all these payments were loans by the 2nd defendant to him. Again, is that really plausible?

[37] It cannot be that the matching payments were all a coincidence as the 2nd defendant would not have known what payments would actually be consistent with the amounts written on his cheque butts. The irresistible inference is that there was a common dealing between the 2nd defendant and the 4th defendant.

[38] The 4th defendant had failed to provide any evidence of the existence of the loan apart from his oral assertions. Again, his admission of the matching payments only came about after interrogatories were ordered by the court. He failed to provide any documentary evidence for any or all of the loans. He failed to call the 2nd defendant to support his contention of the existence of loans between himself and the 2nd defendant.

[39] What is also damning of the 4th defendant is the evidence of the 3rd defendant who testified that the 4th defendant was involved in the degrading of the products so as to reduce the price of the goods. This is clear from the evidence of the goods preparation form (exh. P13) and Strategic Strength Sdn Bhd's packing list (exh. P12) which show that the same goods, as they substantially matched in serial numbers assigned to the product, had different grades.

[40] Further, the 4th defendant's knowledge of the irregular transactions was also confirmed by the 3rd defendant who testified that the 4th defendant would use words like "you know who" in respect of sales to dummy companies.

[41] I was therefore also convinced that the 4th defendant received the sum of RM178,827 as secret profits or commission. There was overwhelming and compelling evidence of his knowledge, culpability and complicity in the transactions carried out by the 2nd defendant and his accomplices.

[42] I now come to the broad issues as set out earlier.

Was There Negligence On The Part Of The 1st Defendant?

[43] It is undeniable that the 1st defendant owed a duty to the plaintiff to ensure that there were no losses and certainly no profits made by the employees at the expense of the plaintiff. He was, after all, employed as a general manager and in that capacity had overall control over the operations and assets of the plaintiff company. With the finding that he had the knowledge and was complicit in the actions of the 2nd defendant, it was patently obvious that he had breached his duty.

[44] Even if it was the case that he did not know with precision the entirety of what and all that was going on, the irresistible inference must certainly be that he did not care to know and gave the 2nd defendant a *carte blanche* to operate as he did. In any event, and at the very least, he failed to exercise reasonable diligence and discretion in securing the best possible price for the said goods. A case of negligence had therefore been made out by the plaintiff.

Was There Breach Of Fiduciary Duty On The Part Of The 1st And 4th Defendant?

[45] According to *Clerk & Lindsell on Torts*, 18th edn, a "breach of fiduciary duty is a civil cause of action for a failure to meet one of the obligations that, in equity, had created a special relationship of fiduciary and principal between the defendant and the claimant respectively, which, if established, would entitle the claimant to equitable compensation for his loss or to restitution for the fiduciary's unauthorized gain" (at para 28-01).

[46] The nature of the fiduciary duty itself was set out in *Bristol v. West Building Society v. Mothew* [1996] 4 All ER 698 where Millet LJ stated (at 711-712):

> This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who had undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of fiduciary is the obligation of loyalty. This principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligation. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work Fiduciary Obligation (1977) p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

[47] In the Australia High Court decision of *Hospital Products Ltd v. United States Surgical Corporation and Others* [1984] 55 ALR 417, Mason J alluded to fiduciary relationships as follows (at 454):

> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v. Boardman* [1997) 2 AC 46 at 127), *viz* trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interest of another person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

[48] In the instant case, the 1st defendant was the general manager where job description showed that he was responsible for the entire operations of the plaintiff so as to ensure a reasonable return on shareholders' fund. The 4th defendant was the plant manager. He was responsible to coordinate, develop and implement plans and objection for the production and quality assurance department, establish and develop system and procedure for safety, production and quality assurance functions,

direct and control department heads to achieve target set for quality, production volume and costs and production development as well as develop and recommend organization structure and staff hiring.

[49] From the nature of their functions and duties, there was no doubt that they owed fiduciary duties of acting in good faith, of loyalty and fidelity. They were not to act in a manner where their duty and interest may conflict and certainly not to act for their own benefit to the detriment of their employer without their employer's consent.

[50] The evidence, as I had observed earlier, clearly showed that far from their acting in a manner befitting trust and confidence, as was the obligation of fiduciaries, the 1st and 4th defendants acted to enrich themselves at the expense of their employer, the plaintiff. There was therefore, to my mind, a clear breach of fiduciary duty on the part of the 1st and 4th defendants.

Was There A Conspiracy Between The 1st, 2nd And 4th Defendants To Injure The Business Of The Plaintiff Company?

[51] It is now settled in most Commonwealth jurisdictions that there are two forms of the tort of conspiracy; conspiracy to use unlawful means and conspiracy to injure. A conspiracy by unlawful means is proven when two or more individuals combine to commit an unlawful act or to effect an unlawful purpose with the intention of causing injury or damage to the plaintiff. Now it is also possible to prove conspiracy where lawful means have been used. That is the case with conspiracy to injure. The distinction between the two is that in the case of conspiracy to injure, the plaintiff must also prove that there was a predominant purpose on the part of the defendants to injure the plaintiff in carrying out their common purpose (see *Lorenho Plc v. Fayed* [1992] 1 AC 448).

[52] However, the instant case, as argued by the plaintiff, was one of conspiracy by unlawful means even though reference was made to the phrase "conspiracy to injure". So in essence, all that the plaintiff has to prove is that the defendants had the intention to injure the plaintiff. That need not be the predominant motive. This is because it is clear in the instant case that unlawful means were employed to carry out their illegitimate activities. The unlawful means lies in the whole manner in which the defendants had acted to procure secret profits for themselves.

[53] As for the act of conspiring, this involves the agreement to work on furtherance of the common purpose. This was explained by the Indian Supreme Court in *Hussain Umar v. Dalip Singhji* AIR (57) [1970] SC 45 as follows (at 51):

> The agreement is the gist of the offence. In order to constitute a single general conspiracy there must be a common design and a common intention of all to work in furtherance of the common design. Each conspirator plays his separate part in one integrated and united effort to achieve the common purpose. Each one is aware that he has a part to play in a general conspiracy though he may not know all its secrets or the means by which the common purpose is to be accomplished. The evil scheme may be promoted by a few, some may drop out and some may join at a later stage, but the conspiracy continues until it is broken up. The conspiracy may develop in successive stages. There may be a general plan to accomplish the common design by such means as may from time to time be found expedient. New techniques may be invented and new means may be devised for advancement of the common plan. A general conspiracy must be distinguished from a number of separate conspiracies having a similar general purpose. Where different groups of person co-operate towards their separate ends without any privity with each other, each combination constitutes a separate conspiracy. The common intention of the conspirators then is to work for the furtherance of the common design of his group only.

[54] In the instant case, as I had alluded to earlier, there was clear evidence of knowledge and complicity on the part of the 1st, 2nd and 4th defendants and even the 3rd defendant who had later come clean on his role, of the transactions that enriched them to the detriment of the plaintiff company. I was therefore more than satisfied that conspiracy was established by the plaintiff.

Was There Receipt Of Secret Profits By The 1st And 4th Defendants From The 2nd Defendants?

[55] I had already alluded to at length on the issue of secret profits. At the risk of repetition, it was clear from the evidence that the 1st and 4th defendants had received secret profits as was evidenced from the cheque butts and the evidence of the 3rd defendant.

A **Damages**

[56] Arising out of the wrongful conduct of the 1st and 4th defendants, the plaintiff is claiming damages under various head of losses. The claims were assessed as follows:

B *(a) 1st Head Of Claim/Loss*

[57] The 1st head of losses claimed is in relation to dummy companies or companies related to the 2nd defendant to which finished goods were supplied for onward sale. There was no C quarrel with the plaintiff's evidence that total sales in this regard came to RM15,549,078.77. The plaintiff calculated the average contribution margin from the personal register of the 2nd defendant at 20-30% and came to the loss figure of RM3,156,462.99.

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[58] In my assessment, this contribution margin formula, although not challenged by the defendants, appears too high. I should think that in order to avoid any criticism of unjust enrichment, a contribution margin of 5% is more than acceptable. This would be E the very least that the plaintiff would have lost.

[59] I would therefore allow damages under this head of claim at 5% of the sum of RM15,549,078.77. The net figure comes to RM777,454.

F *(b) 2nd Head Of Claim/Loss*

[60] The 2nd Head of Losses is for the losses arising from the sales of the goods to the company related to the 1st defendant, CJ Polymer. It was hardly disputed that the total sales amounted G to RM4,468,887.40. In computing the losses, the plaintiff referred to the Average Approved Export Price as extracted from the PCI Report and compared it to the plaintiff's Actual Average Export Price for Grade A Resins sold to CJ Polymer where the difference was established as 10.4%.

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[61] Again, to avoid any possible hint of unjust enrichment, I think a reasonable price difference of 5% would be more than acceptable. I would therefore allow damages under this head at 5% of RM4,468,887.40. The net amount comes to RM223,444.

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(c) 3rd Head Of Claim/Loss

[62] The next head of losses claimed is for sales to companies which are not related to the 2nd defendant where the total sales recorded was RM59,851,101. To establish the margin of 8.48% the plaintiff referred again to the prices in the PCI Reports.

[63] Unlike the heads of claim assessed earlier, I considered that there was insufficient proof to suggest that the goods were sold intentionally at lower prices. Unlike the earlier situation, there was a lack of evidence of the involvement of the 2nd defendant in this case. I would therefore disallow the claim in this regard.

(d) 4th Head Of Claim/Loss

[64] This head of claim was for the category of sales to other local customers at possibly lower selling prices. The total sales was computed at RM77,295,356.08. For the same reasons as immediately above, I would disallow this claim as not being sufficiently proven.

(e) 5th Head Of Claim/Loss

[65] These were losses arising from the Balkan Pacific Contract for which there were sales recorded at a price of RM68,400 to a fictitious company called Balkan Pacific Company Ltd. The same product was then sold by Strategic Strength Sdn Bhd, a company related to the 2nd defendant, to Pet Bottle Co. (POT) Ltd in Colombo for the price of RM85,576. This was unchallenged. The plaintiff is therefore entitled to the difference in the price, that is, RM17,176 which was the profit margin from the purported sub-sale.

(f) 6th Head Of Claim/Loss

[66] This claim was labelled by the plaintiff as wasted expenditure. This was in fact a claim for the salaries and other payments made to the 1st and 4th defendants during their employment with the plaintiff.

[67] I consider this claim to be rather harsh as I am sure that the defendants, apart from their illicit conduct in enriching themselves, had also legitimately contributed to the plaintiff's profits in some way. This claim, in my view, was not sufficiently justifiable in the circumstances and has to be dismissed.

(h) 7th Head Of Claim/Loss

[68] This was a claim for the secret profits obtained by the 1st and 4th defendants. As I had alluded to before, there was clear evidence of receipt of such secret profits of RM170,670 by the 1st defendant and RM178,827.70 by the 4th defendant.

[69] The Court of Appeal in *Tan Sri Dato' Dr Awang Had Salleh & Anor v. Dato' Dr Hj Mohamed Haniffa Hj Abdullah* [2007] 5 CLJ 565 dealt with the question of what amounted to be secret commission or bribe. The Court of Appeal accepted the proposition that a fiduciary would be liable to account for the secret profits, or commission or bribe (see *Attorney-General of Hong Keng v. Reid and Others* [1994] 1 All ER 1).

[70] I would therefore order that the 1st and 4th defendants account for the said profits to the plaintiffs in the amounts that I have stated.

Conclusion

[71] In the premises, I would allow the claim by the plaintiff against the 1st and 4th defendants as follows:

1) the sum of RM777,454 for losses suffered by the plaintiffs as a result of the Cyplast contracts, the Brylchem contracts, the Chemipac contracts, the Brylchem Enterprise contract, the K4 Bistek contracts, the Tradespec contracts and the Trans-Polymers contracts;

2) the sum of RM223,444 in relation to the CJ Polymer contracts;

3) the sum of RM17,160 for the Balkan Pacific contracts; and

4) the sum of RM170,670 as against the 1st defendant and the sum of RM178,827.70 as against the 4th defendant on account of secret profits obtained by the said defendants.

[72] I would also order interest at 8% per annum on the above stated sums from the date of judgment until payment.

[73] In view of my findings on the plaintiff's claim, I would also order that the counter claim by the 1st defendant alleging wrongful dismissal by the plaintiff be dismissed. The plaintiff is also entitled to costs. After hearing the parties, I assessed the costs payable by the 1st and 4th defendant at RM50,000 each.